

ATTACHMENT 3

Level 3/CenturyTel Texas Arbitration

**Arbitration Award
Level 3 Motion for Reconsideration**

PUC DOCKET NO. 26431

2004 MAR 11 AM 11:08

PUBLIC UTILITY COMMISSION
CLERK

PETITION OF LEVEL 3	§	PUBLIC UTILITY COMMISSION
COMMUNICATIONS, LLC, FOR	§	
ARBITRATION PURSUANT TO 47 U.S.C.	§	OF TEXAS
\$252 OF INTERCONNECTION RATES,	§	
TERMS, AND CONDITIONS WITH	§	
CENTURYTEL OF LAKE DALLAS, INC.	§	
AND CENTURYTEL OF SAN MARCOS,	§	
INC.	§	

ARBITRATION AWARD

TABLE OF CONTENTS

I. DISCUSSION OF DPL ISSUES	4
A. DPL ISSUE NO. 1: IS ISP-BOUND TRAFFIC SUBJECT TO DIFFERENT INTERCONNECTION REQUIREMENTS THAN LOCAL TRAFFIC UNDER FEDERAL LAW SUCH THAT IT SHOULD BE HANDLED BY SEPARATE AGREEMENTS?	5
1. Level 3's Position	5
2. CenturyTel's Position	8
3. Arbitrators' Decision	12
B. DPL ISSUE NO. 2: WHAT IS THE PROPER DEFINITION OF LOCAL TRAFFIC?	14
1. Level 3's Position	14
2. CenturyTel's Position	17
3. Arbitrators' Decision	21
C. DPL ISSUE NO. 3: WHAT IS THE PROPER TREATMENT OF FOREIGN EXCHANGE (FX) OR "VIRTUAL NXX" TRAFFIC FOR INTERCARRIER COMPENSATION PURPOSES?	23
1. Level 3's Position	23
2. CenturyTel's Position	28
3. Arbitrators' Decision	33
D. DPL ISSUE NO. 4: HOW SHOULD THE PARTIES DEFINE BILL-AND-KEEP COMPENSATION TO IMPLEMENT THE FCC'S ORDER ON REMAND?	35
1. Level 3's Position	35
2. CenturyTel's Position	36
3. Arbitrators' Decision	37
II. CONCLUSION	39
III. POST-AWARD PROCEDURAL SCHEDULE	39



Control Number: 26431



Item Number: 56

Addendum StartPage: 0

PUC DOCKET NO. 26431

PETITION OF LEVEL 3	§	PUBLIC UTILITY COMMISSION
COMMUNICATIONS, LLC, FOR	§	
ARBITRATION PURSUANT TO 47 U.S.C.	§	OF TEXAS
§252 OF INTERCONNECTION RATES,	§	
TERMS, AND CONDITIONS WITH	§	
CENTURYTEL OF LAKE DALLAS, INC.	§	
AND CENTURYTEL OF SAN MARCOS,	§	
INC.	§	

ARBITRATION AWARD

This Arbitration Award addresses interconnection for ISP-bound FX-type traffic.¹ The Arbitrators were faced with a primary issue for determination:

- 1.) whether Level 3 Communications, L.L.C.'s (hereafter Level 3) ISP-bound traffic was subject to different interconnection requirements under federal regulation such that a separate agreement was required subject to federal jurisdictional standards.

The Arbitrators were then required to:

- 2.) determine the appropriate definition of "local" traffic;
- 3.) determine the proper inter-carrier compensation treatment for Foreign Exchange (FX) and "Virtual NXX" traffic; and, finally,
- 4.) determine the appropriate definition of Bill-and-Keep compensation for implementation of the FCC's *ISP Order on Remand*.

The Arbitrators have concluded that ISP-bound traffic is not subject to interconnection requirements different from those for local traffic and therefore does not require a separate interconnection agreement. However, non-local ISP-bound traffic is not entitled to reciprocal compensation under an interconnection agreement.

Attachment A - Background and Reference Information

I. JURISDICTION	42
II. PROCEDURAL HISTORY	42
III. RELEVANT STATE AND FEDERAL PROCEEDINGS	43
A. RELEVANT COMMISSION DECISIONS	43
1. <i>Mega-Arbitrations</i>	43
2. <i>Docket No. 18082</i>	43
3. <i>Other Post-Interconnection Agreement Disputes</i>	46
4. <i>Docket No. 21982</i>	46
5. <i>Docket No. 24015</i>	47
B. RELEVANT FEDERAL COMMUNICATIONS COMMISSION DECISIONS	48
1. <i>Declaratory Ruling</i>	48
2. <i>ISP Remand Order</i>	49
C. RELEVANT COURT DECISIONS	51
1. <i>Bell Atlantic Telephone Companies v. FCC</i>	51

Attachment B - DPL Decision Matrix

(Art. I, paragraph 1; Art. II, Secs. 1.43 and 1.49(a); Art. V., Secs. 1, 3.1, 3.2, 4.2, and 4.3; and Art. VIII, Sec. 3)

- **DPL Issue No. 2:** **What is the proper definition of Local traffic?**
(Art. II, Sec. 1.58)
- **DPL Issue No. 3:** **What is the proper treatment of Foreign Exchange (FX) or “Virtual NXX” traffic for intercarrier compensation purposes?**
(Art. II, Sec. 1.58; and Art. V, Sec. 3.2)
- **DPL Issue No. 4:** **How should the parties define Bill-and-Keep compensation to implement the FCC’s *Order on Remand*?**
(Art. II, Sec. 1.11; and Art. V., Sec 3.2)

- A. DPL Issue No. 1: Is ISP-bound traffic subject to different interconnection requirements than Local traffic under federal law such that it should be handled by separate agreements?**

1. Level 3’s Position

Level 3’s position has always been that the commission has jurisdiction over its Petition pursuant to FTA §252 and P.U.C. PROC. R. 22.305² and that this arbitration should be resolved pursuant to the standards of 47 U.S.C. §§251 and 252.

Level 3 has stated that it does not contest that its ISP-bound traffic is subject to different inter-carrier compensation rules than local traffic pursuant to federal regulations. However, Level 3 noted that the FCC had made clear its intention to maintain applicable interconnection rules and that ISP-bound traffic should remain subject to the same interconnection terms as local traffic. Level 3 noted that the FCC had clarified at the time of its decision in the *ISP Remand Order* that the decision only affected inter-carrier compensation applicable to delivery of ISP-bound traffic and that it did not alter carriers’ other obligations under Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements.³

² The Arbitrators observe that Subchapters P, Q, and R (which include provisions such as §§ 22.305 regarding arbitration of interconnection agreements) have very recently been repealed and replaced by new 16 TEX. ADMIN. CODE Ch. 21. This Arbitration Award refers to and applies the Chapter 22 provisions.

³ *Petition for Arbitration of Level 3 Communications, L.L.C.*, August 7, 2002, pp. 9-11.

Level 3 has confirmed throughout this arbitration that all of its current FX traffic is ISP-bound. The Arbitrators have concluded that ISP-bound traffic is not subject to the same inter-carrier compensation as local traffic, and that ISP-bound traffic is therefore subject to the FCC's *ISP Order on Remand* Bill-and-Keep requirements. However, the Arbitrators have also concluded that the design of Level 3's network, as discussed throughout this Arbitration, does not include a local presence (modem banks) for termination of Level 3's ISP traffic and, therefore, requires appropriate compensation be made to CenturyTel of Lake Dallas, Inc., and CenturyTel of San Marcos, Inc. (hereafter CenturyTel), in the form of either special access or switched access arrangements employed in the interconnection agreement. The Arbitrators' decisions, explained in greater detail in this Award and the attached Issue Matrix (*Attachment B, Docket No. 26431 - DPL Decision Matrix*), consider the decisions of the FCC and this commission and is based upon the requirement that ISP-bound traffic must be segregated for billing purposes and is subject to separate compensation procedures pursuant to a case by case evaluation. In this specific case, Level 3 traffic, though ISP-bound, does not terminate within the local service area boundaries of CenturyTel but transits the public switched network (PSN) to distant exchanges without providing compensation to CenturyTel in either the form of special access arrangements or the usual switched access arrangements and charges.

CenturyTel and Level 3 shall incorporate the decisions approved in this Award in any interconnection agreement which is subject to the outcome of this proceeding.

I. DISCUSSION OF DPL ISSUES

This proceeding addresses the four issues in the parties' revised final joint DPL filed on October 15, 2002:

- **DPL Issue No. 1: Is ISP-bound traffic subject to different interconnection requirements than Local traffic under federal law such that it should be handled by separate agreements?**

¹ Background and reference information (such as jurisdiction, procedural history, and summaries of relevant State and federal proceedings), can be found in Attachment A to this Arbitration Award.

Level 3 reasoned that the language in this footnote does not indicate that the FCC intended to treat ISP-bound traffic differently for all purposes.⁶ Indeed, Level 3 argued, had the FCC intended to remove ISP-bound traffic from existing interconnection agreement terms it would have established alternative interconnection rules for this purpose just as it established alternative inter-carrier compensation rules.⁷

Level 3 differentiated between the FCC's intention to treat ISP-bound traffic intercarrier compensation separately and its intentions regarding treatment of ISP-bound traffic with regard to interconnection terms and conditions. Level 3 argued that the separate IATA proposed by CenturyTel to govern ISP-bound traffic is unwarranted because it treats ISP-bound traffic as if local interconnection with the public switched network should operate differently from any local traffic interconnection.⁸

Level 3 asserted that CenturyTel's IATA would result in Level 3 having to trunk to each CenturyTel end office in a serving area at special access rates. Level 3 further asserted that this would result in anticompetitive delays and a rate structure at odds with the FCC's cost-based obligations.⁹ In addition, according to Level 3, the IATA imposes unspecified originating usage charges on ISP-bound calls, thus violating the FCC's directive in the *ISP Remand Order* to apply bill-and-keep to such calls. In Level 3's analysis, the IATA proposed by CenturyTel is discriminatory because, she asserted, CenturyTel serves its own ISP customers using local service tariff terms and rates.¹⁰

In its *Post Hearing Reply Brief*, Level 3 re-asserted its position regarding the FCC's intent as expressed in footnote number 149 of the *ISP Remand Order*. Level 3 noted that the FCC clearly indicated in its footnote to the Order that it did not intend to preempt the state's jurisdiction over interconnection and that CenturyTel had never addressed this crucial matter in its Briefs. Level 3 reasoned that CenturyTel ignores the FCC's footnote 149 implication, as well

⁶ *Id.* at 7.

⁷ *Id.* at 8

⁸ *Id.*

⁹ *Reply Testimony of Michelle Krezek on Behalf of Level 3 Communications, L.L.C.*, October 16, 2002, p. 4.

¹⁰ *Id.* at 6.

Level 3's *Legal Brief*, filed September 23, 2002, discussed its position regarding this initial issue in greater detail. Level 3 made four arguments to support the commission's jurisdiction over this interconnection dispute⁴:

- a.) §§251 and 252 of the FTA impose the interconnection obligation upon the ILECs and grant the state commissions the authority to approve, reject, mediate and arbitrate all interconnection agreements and disputes;
- b.) §251(b)(5) was preempted by the FCC only for the purpose of establishing FCC authority over inter-carrier compensation for ISP-bound traffic;
- c.) the scope of §§251 and 252 is not limited to intrastate services or intrastate matters, and historically the FCC has affirmed a hybrid approach such that carriers requesting to use unbundled network elements to provide exchange access services were subject to state commissions' reviews; and
- d.) if the commission should fail to assert jurisdiction it would disfavor an architecture that would directly compete with CenturyTel for ISP connectivity, thus failing the public interest.

Level 3 stated that CenturyTel misinterpreted federal law and that FTA §§251-252 governs interconnection without limitation between carriers.⁵ Level 3 also asserted that the FCC and court decisions only preempt states on the discrete issue of setting the inter-carrier compensation. Level 3 re-emphasized the *ISP Remand Order's* "footnote 149" language, which stated that the FCC's decision:

"affects only the intercarrier compensation (*i.e.*; rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection."

⁴ Level 3 Communications, L.L.C., *Legal Brief*, September 23, 2002, pp 1-12.

⁵ *Direct Testimony of Michelle Krezek on Behalf of Level 3 Communications, L.L.C.*, October 10, 2002, p.6.

Further, CenturyTel noted that the D.C. Circuit had made clear that the FCC's *ISP Order on Remand* eliminated the state commissions' jurisdiction under FTA §252(e)(1) regarding the resolution of interconnection issues when ISP-bound traffic was at issue.¹⁶

On the basis of these citations, CenturyTel concluded the commission had no authority to arbitrate ISP-bound issues and that Level 3 must accept either a separate interstate agreement for its purposes or purchase the required services via tariff (i.e.; 800 access service or special access provisions).

In addition, CenturyTel asserted it had no obligation to transport or terminate Level 3's ISP-bound traffic. Aside from its position that ISP-bound traffic was clearly excluded from the interconnection obligations of FTA §251(c)(a), CenturyTel noted that FTA §251(a) only obliges CenturyTel to link its network with Level 3, not to transport or terminate ISP-bound traffic. CenturyTel stated that even if the FCC did not intend its *ISP Order on Remand* to "alter carriers' other obligations," as asserted by Level 3, there was "no evidence to support the conclusion that CenturyTel was ever obligated to interconnect with Level 3 in the first instance."¹⁷

CenturyTel elaborated upon this position by noting that FTA §251(c)(2) imposes a duty upon ILECs to provide interconnection for the purpose of transmission and routing of telephone service and exchange access service and was further interpreted by the FCC in its *Local Competition Order* to mean "all carriers (including those traditionally classified as IXCs) may obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the same telephone exchange (i.e., non-interexchange calls)." Because Level 3's ISP-bound traffic does not originate and terminate in the same telephone exchange, CenturyTel emphasized it had no obligation to interconnect with Level 3. CenturyTel asserted that interconnection does not impose an obligation to transport or terminate traffic despite Level 3's reference to the footnote in the *ISP Order on Remand* because the obligation to transport ISP-bound traffic to points of interconnection with information service providers (ISPs) never existed under FCC Part 51 rules.¹⁸

¹⁶ *WorldCom Inc. v. FCC*, No. 01-1218, slip. op. at 3 (D.C. Cir. May 3, 2002).

¹⁷ See *CenturyTel Response to Level 3 Request for Arbitration*, p. 9.

¹⁸ *Id.* at

as numerous other state commissions' decisions that assert state jurisdiction in this matter.¹¹ Further, Level 3 argued that the only state commission arbitration decision upon which CenturyTel relies has yet to be approved and is fraught with legal errors, primarily disregard of the crucial footnote 149.¹² Level 3 noted that a recent decision in Wisconsin addressed each of the three issues that must be determined in this arbitration and concluded that the jurisdiction over this dispute was clearly the State's.¹³ Level 3 further noted that in that Wisconsin decision, the arbitrator concluded that footnote 149 explicitly stated that the FCC had not altered carriers' obligations to transport ISP-bound traffic to points of interconnection, that the D.C. Circuit opinions rejected §251(g) as a basis for interstate jurisdiction over internet traffic, and that state regulation may overlap interstate regulation pursuant to the broad nature of §252.

2. CenturyTel's Position

CenturyTel maintained that this issue was a threshold matter because it determined whether the commission had jurisdiction over the transport and termination of ISP-bound traffic. CenturyTel asserted that the FCC, under its FTA §201 authority, had made it clear that ISP-bound traffic was interstate in nature and that it had taken the authority over ISP-bound traffic away from state commissions.¹⁴ CenturyTel stated that this was made clear in the *ISP Remand Order* at footnote 69 which references the jurisdictionally interstate nature of ISP-bound traffic. CenturyTel asserted that the FCC concluded that local traffic was defined by an "end to end analysis" and that ISP-bound traffic's jurisdiction was determined "by the end points of the communication". Therefore, CenturyTel concluded that the FCC had determined that ISP traffic was under its jurisdiction, not the States', pursuant to FTA §201 authority.¹⁵

¹¹ *Post Hearing Reply Brief of Level 3 Communications, LLC*, December 13, 2002, pp. 1-3.

¹² *Id.* at 3. Level 3 refers to Colorado's arbitration decision as fraught with factual and legal errors. Level 3 relies upon the decisions made in Minnesota, North Dakota, Washington and Wisconsin.

¹³ *Id.* at 4-5.

¹⁴ See *Response to Level 3 Petition for Arbitration*, September 3, 2002, pp. 5-8.

¹⁵ *ISP Remand Order* ¶40.

asserted that the FCC was simply limiting its interim regime, the phase out of compensation paid for ISP-bound traffic, to the delivery of ISP-bound traffic, and clarifying that its decision did not alter carriers' obligations to transport telecommunications traffic to POIs²⁰ or alter existing interconnection agreements.

Finally, in its *Brief on Issue 1*, CenturyTel asserted that its companies are "rural" by federal definition, FTA 47 U.S.C. §153(37), and are exempt from the obligations of FTA §251(c) by virtue of FTA §251(f). FTA §251(f) exempts rural companies until the state commission terminates the exemption under a proceeding proscribed by FTA §251(f) (1) (B). Because such a proceeding has not taken place, CenturyTel continues to possess its rural exemption. CenturyTel reiterates that its exemption only applies to FTA §251(c) so that, if Level 3 seeks interconnection for traffic, other than that which is ISP-bound, the exemption would apply.

CenturyTel described the history of this dispute as one in which it became aware that Level 3 was not seeking to engage in the exchange of local telecommunications traffic, but proposing instead to exchange only ISP-bound traffic.²¹ When CenturyTel realized this, it proposed the IATA for Level 3's ISP-bound traffic. CenturyTel maintained its position that ISP-bound traffic is not subject to the jurisdiction of the state.²²

In its *Reply Brief*, CenturyTel asserted its opinion that Level 3 attempts to use footnote 149 of the FCC's *ISP Remand Order* to evade the application of legitimate interexchange access charges. CenturyTel reasoned that Level 3's argument that the *ISP Remand Order* applied 47 C.F.R. §51.703(b), which bans originating access on telecommunications traffic, to all ISP-bound traffic, regardless of whether the traffic is local or interstate in nature, is logically flawed. If this reasoning is applied, CenturyTel asserted it would result in the elimination of access charges for *all* ISP-bound calls, including those that are completed via 1+ dialed toll or 800 services. CenturyTel argued that Level 3's interpretation is based on an erroneous premise because C.F.R. §51.703(b) never applied to ISP-bound traffic or interexchange traffic. Further, CenturyTel argued that C.F.R. §51.701(b) defines the telecommunications traffic referenced in

¹⁹ See Docket No. 24015 *Arbitration Award* at p. 31 and *Brief of CenturyTel on Issue 1* pp. 3-5.

²⁰ POIs – Points of Interconnection.

²¹ *Direct Testimony of Susan W. Smith on Behalf of CenturyTel of Lake Dallas, Inc. and CenturyTel of San Marcos, Inc.*, October 10, 2002, p.7

Finally, CenturyTel referred the arbitrators to the D.C. Circuit decision which questioned whether LECs even have an obligation to interconnect with other LECs for ISP-bound calls. CenturyTel noted that the D.C. Circuit affirmed that a carrier was not compelled to interconnect under FTA §201 unless the FCC invokes certain procedures. Because a hearing and determination of the public interest has not occurred at the FCC, and an order has not been issued to mandate Level 3's interconnection with CenturyTel, CenturyTel concluded that there is no obligation to interconnect in this instance.

CenturyTel indicated that a separate *Information Access Traffic Exchange Agreement* (IATA), specifically designed for ISP-bound traffic interconnection, is the methodology by which it prefers to handle ISP traffic issues. CenturyTel has offered such an agreement to Level 3, which has rejected it, and CenturyTel concluded that the state commission has no authority to review ISP related matters.

In its *Brief on Issue 1*, CenturyTel urged the commission to determine by preliminary order whether ISP-bound traffic was within its jurisdiction. CenturyTel cited the recent *Arbitration Award* in Docket No. 24015, in which the arbitrators declined to address ISP-bound traffic because it is no longer governed by §251(b)(5) but by §201.¹⁹ CenturyTel insisted that Level 3 was seeking an arbitration of interconnection for ISP-bound traffic in which the same standards that are applied to non-ISP traffic, pursuant to FTA §252, are applied. CenturyTel argued that this goal is strictly denied by the FCC's *ISP Remand Order* because the traffic for which Level 3 seeks this interconnection agreement is primarily, if not entirely, ISP-bound according to all information provided by Level 3. Further, CenturyTel noted that the *ISP Remand Order* states that the "opt-in" provision of FTA §252 "applies only to agreements arbitrated pursuant to Section 252" and "has no application in the context of an intercarrier compensation regime set by this Commission pursuant to Section 201".

CenturyTel interprets this to mean that ISP-bound traffic has been wholly removed from the arbitration provisions of the FTA and state commissions no longer have such authority. The obligation of a LEC to transport and terminate ISP-bound traffic has clearly been rejected by the FCC, according to CenturyTel, and, therefore, the interconnection rules applicable to local traffic do not apply despite Level 3's appeal to footnote 149 of the *ISP Order on Remand*. CenturyTel

Substantive Rule §26.114 (the Rule), all of which encourage the establishment of competitive LECs with the goal of providing the benefits of competition in local telecommunications markets.

Notwithstanding these FCC concerns, the Arbitrators agree with Level 3's contention that the FCC made clear its intention to maintain applicable interconnection rules and terms for ISP-bound traffic in its ISP Remand Order .

The FCC clarified within the ISP Remand Order that its decision only affected inter-carrier compensation applicable to delivery of ISP-bound traffic and that it did not alter carriers' other obligations under Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements. The much debated ISP Remand Order's "footnote 149" does not specifically address the issue of other areas which would affect interconnection for the purposes of ISP-bound traffic exchange. The Arbitrators are of the opinion that the FCC, if it had intended that a separate process be instituted for the purposes of ISP-bound traffic interconnection, would note this in its Order and establish either the requirements or a proceeding to address such requirements. Finally, the Arbitrators concur with Level 3's conclusion that FTA §§251 and 252 grant the state commission the authority to arbitrate all interconnection agreements and disputes and that this broad mandate has not been amended to exclude the circumstances of the arbitration at hand in this docket. The Arbitrators conclude that the FCC has not limited the State commissions' authority over intrastate services and issues.

Therefore, the Arbitrators disagree with CenturyTel's interpretation that Level 3's interconnection agreement is no longer governed by FTA §251(b)(5) and that all ISP-bound services are now governed by FTA §201. Although the Arbitrators acknowledge the Award issued in Docket No. 24015, they do not reach the conclusion argued by CenturyTel that the decision in that docket excludes an examination of ISP-bound traffic services. Rather, the Arbitrators believe that the decision in Docket No. 24015 correctly excludes the commission's involvement in a determination of the reciprocal compensation for ISP-bound traffic. The FCC has clearly stated its intention that ISP-bound traffic compensation is within its purview and has established an interim process and an additional Notice of Proposed Rulemaking (NPRM) to address the compensation issues.

²⁸ *Id.* at ¶4.

§51.703(b) as telecommunications traffic exchanged between a LEC and a telecommunications carrier, other than a CMRS provider, *"except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access. (See FCC 01-131, paragraphs 34, 36, 39, 42-43)."*²³ CenturyTel asserted that these latter citations refer to the FCC's *ISP Remand Order* and that these paragraphs are to be relied upon to determine the meaning of the definition for telecommunications traffic. CenturyTel reasoned that these same terms are used in FTA §251(g) to define traffic which is excluded from reciprocal compensation rules. CenturyTel cited paragraph 36 of the *ISP Remand Order* which stated that ISP-bound traffic fell within at least one of the three categories of §251(g).²⁴

3. Arbitrators' Decision

*The Arbitrators note that Level 3 seeks an interconnection agreement with CenturyTel exclusively for ISP-bound traffic services in this docket.*²⁵ *Although Level 3 advises it may enlarge its scope of business to local traffic services, it has no schedule in place for this purpose, nor are any such services involved in the required decisions in this arbitration.*²⁶

*The FCC expressed its concern in the ISP Remand Order that LECs that are intent on exclusive ISP service are driven by regulatory opportunities that disconnect the costs of the service from end-user market decisions.*²⁷ *Thus carriers compete not on the basis of quality and efficiency but on the basis of their ability to shift costs to other carriers, "a troubling distortion that prevents market forces from distributing limited investment resources."*²⁸ *Level 3's current business plan appears to defy the intention of FTA '96, and subsequent FCC Orders, as well as*

²² *Id.* at 6-7.

²³ *Post Hearing Reply Brief of CenturyTel of Lake Dallas, Inc. and CenturyTel of San Marcos, Inc.*, December 13, 2002, pp. 4-6.

²⁴ *Id.* at 7.

²⁵ *Tr.* at 9-20.

²⁶ Level 3 acquired its Service Provider Certificate of Operating Authority (SPCOA No. 60161) in Docket No. 18598 on April 1, 1998. P.U.C. SUBST. R. 26.114 (Suspension or Revocation of Certificates of Operating Authority (COAs) and Service Provider Certificates of Operating Authority (SPCOAs)) provides certain criteria by which a CLEC's SPCOA may be determined to be subject to revocation or suspension. The grounds for initiating an investigation under this rule include "[n]on-use of approved certificate for a period of 48 months, without re-qualification prior to the expiration of the 48-month period." P.U.C. SUBST. R. 26.114(c)(1)(A). The Arbitrators note that Level 3 appears to have exceeded 48 months of non-use of its SPCOA.

²⁷ *ISP Remand Order* ¶5

to the end user of the other party, with reference to existing ILEC calling areas. However, Level 3 noted that CenturyTel excludes FX type, or Virtual-NXX type, traffic from this definition and limited the definition with respect to "internet," "900-976," and "Internet Protocol based long distance telephony." Thus, Level 3's concern with regard to the definition of local traffic is directed at the exclusions proposed by CenturyTel. It is Level 3's position that none of these limitations is justifiable under applicable law and they should therefore be rejected.

In responding to CenturyTel's arguments regarding segregation of local traffic from ISP-bound traffic and its definition of local traffic with regard to VNXX service,²⁹ Level 3 addressed the argument made by CenturyTel that the terms "Internet" and "Internet Protocol based long distance telephony" be included in a definition of those services that are not a part of local traffic as well as CenturyTel's reference to FX and Virtual NXX service as exclusions from the category of "local" service.³⁰ Level 3 argued that the terms proposed by CenturyTel in its definition of "local" service are vague.³¹ Furthermore, Level 3 argued that CenturyTel's definition allows an over-broad interpretation of Level 3's services by CenturyTel, and exceeds the scope of this arbitration because it requires a determination of new policy.³²

In its November 27, 2003 *Initial Post Hearing Brief*, Level 3 asserted its position that the definition of "local traffic" should be determined on a case by case basis and not, as proposed by CenturyTel, in "vague" exclusionary terms adopted for the interconnection agreement.³³ Level 3 found CenturyTel's proposed wording problematic and indicated that its adoption would set in motion continued disputes regarding its application. Further, Level 3 argued that CenturyTel's proposed language serves the purpose of providing an over-broad definition of excluded services to force a factual determination of the appropriate regulatory treatment for such services.³⁴ Level 3 argued again that the FCC has declined to make such determinations absent a complete

²⁹ *Reply Testimony of Michelle Krezek on Behalf of Level 3 Communications, L.L.C.*, October 16, 2002, p.16

³⁰ *Direct Testimony of Susan W. Smith on Behalf of CenturyTel of Lake Dallas and CenturyTel of San Marcos, Inc.*, October 10, 2002, p. 13 and *Direct Testimony of Wesley Robinson on Behalf of CenturyTel of Lake Dallas and CenturyTel of San Marcos, Inc.*, October 20, 2002, p. 7.

³¹ *Reply Testimony of Michelle Krezek on Behalf of Level 3 Communications, L.L.C.*, October 16, 2002, p.16

³² *Id.* at 12

³³ See *Initial Brief of Level 3 Communications, LLC*, November 27, 2003, at p. 17-18.

³⁴ *Id.* at 19-20.

This proceeding examines the appropriate interconnection terms and conditions that apply to a carrier currently providing service solely to ISP customers and indicating some future business plan that includes local service provision (whether this will be in the form of a local presence for its ISP customer or the addition of local services is unknown). Whatever decision is reached regarding the remaining issues in this arbitration, Level 3 requires an interconnection agreement with CenturyTel to provide appropriate service to its customers.

Therefore, the Arbitrators conclude that this arbitration is within the Commission's FTA §252 and P.U.C. PROC. R. 22.305 authority and that the standards of 47 U.S.C. §§251 and 252 apply to this proceeding.

CenturyTel asserts that FTA 47 U.S.C. §153(37) exempts the company from obligations of Section 251(c) by virtue of 251(f) because CenturyTel is a rural carrier. Level 3 does not dispute CenturyTel's rural carrier status but argues that it need not seek to terminate the CenturyTel exemption for its purposes in this arbitration. Pursuant to the provisions of §251(f)(1)(B) the state commission must terminate the rural carrier's exemption if it is to be required to meet the obligations of § 251(c).

The Arbitrators conclude that further action on the part of Level 3 with regard to the provisions of the service model proposed in this arbitration will require a proceeding consistent with §251(f)(1)(B) unless CenturyTel should determine that it waives its right under this statute.

The Arbitrators have determined the appropriate contract language for each of the sections affected by this issue decision and note that "Attachment B, Docket No. 26431 - DPL Decision Matrix" contains these decisions in a compact format as well as the balance of the Award decisions regarding contract language related to the issues discussed below.

B DPL Issue No. 2: What is the proper definition of Local Traffic?

1. Level 3's Position

Level 3 claimed that it concurred with CenturyTel's definition of local traffic to the extent that it is defined as traffic calls originating from an end user of one party and terminating

rejected the FCC's characterization of ISP-bound traffic as exchange access or information access noting that it looks like local traffic.⁴²

2. *CenturyTel's Position*

CenturyTel asserted that the exclusions within its definition of local traffic are reasonable and, based upon the FCC's explicit discussion of these services, not local in nature.⁴³ Again, CenturyTel noted that ISP-bound traffic is not local because it does not originate and terminate within the local area, and, in this case, Level 3's ISP customers are not located in the local calling area.

CenturyTel further argued that the definition of local traffic does not address FX traffic at all and that Level 3's assertion that its proposed service is similar to FX service is erroneous. CenturyTel noted that the FCC has defined FX traffic and that Level 3's proposed service offering differs significantly from the FCC's definition because Level 3 does not propose to purchase a dedicated line.⁴⁴ It is CenturyTel's firm belief that Level 3 only seeks to define its service as FX-type in an effort to avoid the payment of transport, switching and other access charges which would be associated with an 800-type service. CenturyTel asserted that Level 3's service is most like 800 service.⁴⁵

In addition, CenturyTel asserted it had no obligation to transport or terminate Level 3's ISP-bound traffic. Aside from its position that ISP-bound traffic was clearly excluded from the interconnection obligations of FTA §251(c)(a), CenturyTel noted that FTA §251(a) only obliges CenturyTel to link its network with Level 3, not to transport or terminate ISP-bound traffic. CenturyTel elaborated upon this position by noting that FTA §251(c)(2) imposes a duty upon ILECs to provide interconnection for the purpose of transmission and routing of telephone service and exchange access service and was further interpreted by the FCC in its *Local Competition Order* to mean "all carriers (including those traditionally classified as IXCs) may

⁴² *Id.* at 18 re: *Bell Atlantic*, 206 F.3d at 6.

⁴³ CenturyTel proposes that FX, Virtual FX, Information Access, Internet, 900-976, and Internet Protocol traffic be excluded from the definition of local traffic because these do not originate and terminate within the same local calling area.

⁴⁴ An FX arrangement requires a dedicated line between the originating Central Office (also known as an End Office) and the called customer's Central Office.

⁴⁵ *Post Hearing Brief of Level 3 Communications, L.L.C.*, pp. 14-15.

record and urged the commission to maintain this cautious approach.³⁵ Level 3 asserted that the approach advocated by CenturyTel raised discrimination and due process concerns because it would allow this arbitration, without benefit of a record open to all service providers, to establish the set of "exclusions" from the definition of "local traffic".³⁶

Level 3's *Post-Hearing Reply Brief*, December 13, 2002, further refined Level 3's arguments. Level 3 stated that there were two matters of concern involved in the proposed language of CenturyTel.³⁷ The first is the exclusion of "Information Access Traffic," including "Enhanced Service Provider (ESP)" and "Internet Service Provider (ISP)," "Internet," "900-976," and "Internet based long distance telephony." The second is the exclusion of traffic to or from an end user not within the local calling area. Regarding the first set of exclusions, Level 3 asserted that CenturyTel's witness did not support this exclusion on examination and instead acknowledged that a cautious approach was preferable.³⁸ Regarding the second issue, Level 3 asserted that CenturyTel's support of the proposed exclusion was wrong as a matter of law because it excludes FX type traffic (Issue No. 3 in this arbitration). Level argued that CenturyTel has not supported its position that Level 3 seeks to provide originating interexchange service and reiterates that the service being provided is FX-type and indistinguishable from the services arbitrators found to be "local" in Docket No. 24015.³⁹ In the Award in Docket No. 24015, Level 3 noted that the arbitrators conclude that FX and FX type services are no different from a customer perspective whether provided by an ILEC or a CLEC and that ILECs do not subject the traffic on their own FX services to access charges.⁴⁰ Further, Level 3 argued that the differences between its "FX-type" service and 800 or other "toll free" services are not slight. Rather, Level 3 reasoned, toll free services originate in multiple exchanges while Level 3's service will originate in a single exchange, and Level 3's service does not result in a separate subscriber charge.⁴¹ Level 3 reminded the arbitrators that, in *Bell Atlantic*, the D.C. Circuit

³⁵ *Id.* at 19-21.

³⁶ *Id.* at 21-23.

³⁷ *Level 3 Post Hearing Reply Brief*, December 13, 2002, p. 10.

³⁸ Tr. at 795:10-796:8

³⁹ *PostHearing Brief of Level 3 Communications, L.L.C.*, p. 12.

⁴⁰ *Id.* at 12-13.

⁴¹ *Id.* at 13-14.

and increases the problem currently experienced with 800 Service offerings by additionally threatening the exhaustion of NPA numbers, leading to new area codes. CenturyTel's conclusion is that a call cannot be local when its termination is not local, and that treating Level 3's ISP-bound traffic as local traffic will result in discriminatory treatment against other carriers and a negative revenue impact upon CenturyTel.

CenturyTel's position is that the issue at hand is entirely dial up ISP-bound traffic and it disagreed with Level 3's characterization regarding voice and internet telephony policy implications, stating that Level 3 has not deployed voice services or local services and that, in any case, the presumption of the end user's modem being located within the same local calling area as the ISP would not apply, therefore the traffic proposed by Level 3 is interexchange in nature.⁵¹ CenturyTel interprets the FCC's *ISP Remand Order* as merely adding "local" ISP-bound traffic to its existing authority under FTA §201 and determined that Bill-and Keep was the appropriate compensation mechanism for such traffic.⁵² In CenturyTel's view "local" ISP-bound traffic under the analysis of the FCC was that which terminated to the ISP located within the local calling service area

In its *Post Hearing Brief*, CenturyTel claimed that Level 3's proposed language would leave open the status of internet protocol-based services. CenturyTel asserted in its *Brief* that the core of Issue No. 2 is what compensations should apply to Level 3's ISP-bound traffic. CenturyTel insisted that the fact that the ISP end user customer is not located in the local calling area makes the traffic interexchange and that Level 3's proposed approach would logically lead to legitimate interexchange services, because they are ISP-bound, subject to bill-and-keep compensation rather than appropriate access charges.⁵³ Thus, according to CenturyTel, the proposed approach of Level 3 is discriminatory because it treats CLECs serving ISPs differently from the way it treats IXC's serving ISPs.

In the opinion of CenturyTel, the only differences between Level 3's service and 800 service are the use of a seven digit instead of a ten digit number and the lack of a public switched

⁵⁰ *Id.* at p. 12.

⁵¹ *Reply Testimony of Wesley Robinson on Behalf of CenturyTel of Lake Dallas, Inc., and CenturyTel of San Marcos, Inc.*, October 16, 2002, pp. 6-8.

⁵² *Id.* at 20.

obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the same telephone exchange (i.e., non-interexchange calls).” Because Level 3’s ISP-bound traffic does not originate and terminate in the same telephone exchange, CenturyTel emphasized it had no obligation to interconnect with Level 3 for the exchange of this traffic. CenturyTel asserted that interconnection does not impose an obligation to transport or terminate traffic despite Level 3’s reference to the footnote in the *ISP Remand Order* because the obligation to transport ISP-bound traffic to points of interconnection with information service providers (ISPs) never existed under FCC Part 51 rules.⁴⁶ Thus, CenturyTel supported its position regarding the definition of “local” traffic as in accord with the federal regulations related to ISP-bound traffic.

In further support of its position regarding the definition of “local” traffic, CenturyTel noted that Level 3’s traffic will not be local because it will not originate and terminate within the same local calling area, and that Level 3’s proposed methodology for transporting its traffic does not meet the definition of FX Service, which requires a dedicated connection between the customer’s premise (ISP) in one exchange and the (CenturyTel) end office in the foreign exchange.⁴⁷ CenturyTel contended that the fact that the Level 3 service is designed to be inward calling only makes the service most closely resemble 800 Service because FX service is generally a two-way service.⁴⁸

CenturyTel reiterated its argument that the service proposed by Level 3 does not meet the FCC definition of FX service because there is no dedicated connection between the subscriber’s premises and the distant end office.⁴⁹ CenturyTel argued again that not only do Level 3 and its customer ISP avoid any appropriate FX charges but, by providing these “local” numbers from a wholly new set of NPA-NXX assignments, a secondary issue arises regarding contributing to the problem of telephone number exhaustion.⁵⁰ The assignment of multiple numbers within a large geographic area for the purpose of routing calls to a distant ISP mirrors

⁴⁶ *Id.* at

⁴⁷ *Direct Testimony of Susan W. Smith on Behalf of CenturyTel of Lake Dallas, Inc., and CenturyTel of San Marcos, Inc.*, October 10, 2002, pp. 11-12.

⁴⁸ *Id.* at 11.

⁴⁹ *Direct Testimony of Wesley Robinson on Behalf of CenturyTel of Lake Dallas, Inc., and CenturyTel of San Marcos, Inc.*, October 10, 2002, p. 11.

the numbers for the purpose of terminating calls to its customers' locations. In fact, CenturyTel argued, obtaining 134 NPA-NXXs (10,000 numbers in each) indicates that the intent of Level 3 is that calls originating to the ISP customers will be rated as local calls.⁵⁹ This outcome defeats the purpose of the Guideline because it eliminates the reasonable presumption that the physical location of the customer is within the calling area to which the NPA-NXX is homed and therefore, CenturyTel concluded that Level 3's cooperation with the state's number conservation efforts does not solve the problem.⁶⁰

In its December 13, 2002, *Reply Brief*, CenturyTel further asserted that Level 3's approach to the definition of local traffic does not achieve the goal that Level 3 has argued, that a case by case approach is necessary in evaluation of the treatment of "information access" and IP telephony services.⁶¹ Instead, argued CenturyTel, all traffic transmitted to the ISP becomes ISP-bound traffic and therefore subject to bill-and-keep provisions thus circumventing the supposed ability to address such traffic on a case by case basis. CenturyTel concluded that its own language proposal is the only means feasible of ensuring that such traffic matters will be examined on a case by case basis.⁶²

3. Arbitrators' Decision

Although the Arbitrators are not fully persuaded by CenturyTel's arguments that the ISP-bound traffic proposed by Level 3 is most like 800 inter-exchange service, CenturyTel's argument that the proposed service is not local traffic is persuasive. The FCC and the commission have defined local traffic as that which originates and terminates within the local exchange service area. In the Arbitration Award in Docket No. 24015, the locations of the originating and terminating end users were found to determine whether or not the call was local or toll in nature. As a result, any call may be local if its origination and termination occurs within the same local exchange service area. In the instance where an ISP interconnects at the CLEC's POI, via a modem bank, a call placed within the local exchange service area and

⁵⁸ *Id.* at 25 re: Docket No. 24015 Award at p. 36.

⁵⁹ *Id.* at 26.

⁶⁰ *Id.* at 26 re: CT 2, p. 35.

⁶¹ *CenturyTel Reply Brief*, December 13, 2002, p 11.

⁶² *Id.* at 12.

data dip to identify the ISP. CenturyTel noted that Level 3 had admitted no distinction between a seven digit and ten digit approach to dialing the call and that it makes its own data dip to identify the destination ISP.⁵⁴ CenturyTel also cited Docket No. 24015 in defense of its position, stating that the arbitrators had found that the location of the end user originating and the end user to whom the call terminates determines whether or not the call is local or toll, not the rate center to which the NPA-NXX is assigned. CenturyTel insisted that the *ISP Remand Order* had excluded ISP-bound traffic from the obligation of reciprocal compensation and there is no prohibition upon CenturyTel's application of access charges to Level 3 for the origination of such traffic.⁵⁵ CenturyTel based its analysis of Issue No. 2 upon the determination of whether access charges should apply and concluded that access charges do apply, therefore, the exclusions set out by CenturyTel should be incorporated into the interconnection agreement.

In addition, CenturyTel viewed Level 3's use of VNXXs as inconsistent with the Central Office Assignment Guidelines which require NXXs be used to provide service to a customer's premise physically located in the same rate center that the CO codes/blocks are assigned.⁵⁶ Because Level 3 has stated it does not offer local services, and does not have an FX tariffed offering (Tr. pp.9, 26, 71) Level 3 violates the provisions of the Central Office Assignment Guidelines and negates the purpose of the guidelines by using all assigned numbers to provision FX service. In CenturyTel's opinion, Level 3 attempts to pass off as innovative its attempt to utilize NPA NXX assignments to avoid the assessment of access charges.⁵⁷

CenturyTel objected to Level 3's use of VNXXs in what it views as a violation of the Central Office Code Assignment Guidelines. Because the ISP customers are not physically located within the rate center CenturyTel reasoned that this created the opportunity for regulatory arbitrage discussed by the arbitrators in the Award in Docket No. 24015.⁵⁸ Level 3 currently has over 1,340,000 VNXXs in Texas according to CenturyTel which subjects a significant amount of traffic to misclassification and, in CenturyTel's estimation, belies Level 3's argument that it has

⁵³ *Post Hearing Brief of CenturyTel*, November 27, 2002, pp. 11-12.

⁵⁴ *Id.* at 12 re: Tr. at P. 524, Ins. 15-19.

⁵⁵ *Id.* at 15.

⁵⁶ *Id.* at 19-20. re: Robinson Direct, Ex. WR-5, Code Assignment Guidelines, p. 8, ¶2.13

⁵⁷ *Id.* at 21.

concern regarding Level 3's use, and current non-use, of these numbers is legitimate.⁶³ Although there is no evidence at this time that the use proposed by Level 3 will necessitate relief for any Numbering Plan Area, and, despite the fact that procedures are in place at the commission to monitor the use of numbering resources, this is an issue the commission may address in another proceeding. Level 3 has stated it will cooperate in any endeavor to conserve numbers.

At this time, the Arbitrators conclude that the assignment of NPA-NXX's to ISP customers is not an issue in this arbitration, although it may be a matter to be addressed in another proceeding.⁶⁴

C. DPL Issue No. 3: What is the proper treatment of Foreign Exchange (FX) or "Virtual NXX" traffic for intercarrier compensation purposes?

1. Level 3's Position

Level 3 argued that Virtual NXX (FX-type) traffic had been regarded as a functional equivalent to FX service by other commissions and should not be regarded as interexchange traffic for intercarrier compensation purposes as proposed by CenturyTel. Moreover, the commission should conclude, according to Level 3, that ISP-bound Virtual-NXX or FX-type traffic intercarrier compensation has been settled by the FCC and is therefore outside of the commission's scope. Primary to its position is Level 3's concern that CenturyTel proposes to assess access charges which have no basis in law or fact, according to Level 3, because the cost of originating a call to a Level 3 customer does not differ based upon the Level 3 customer's physical location. CenturyTel's responsibility for originating locally dialed traffic will always end at the point of interconnection (POI) with Level 3 regardless of where Level 3's terminating

⁶³ Tr. at 65-68. Level 3 possesses 134 blocks of 10,000 numbers each according to testimony and has assigned very few.

⁶⁴ *For the present, the Arbitrators conclude that Level 3's proposal for assignment of NPA-NXXs to its ISP customers for access by the ISP customers' customers does not harm the numbering system. This does not preclude the Commission from re-visiting this issue at a later date if harm is occurring or in another proceeding if a review warrants.*

terminating to this ISP at the CLEC's POI within that service area is a local call. The Arbitrators also agree with CenturyTel's reasoning that categorizing Level 3's proposed traffic as local discriminates against IXCs serving ISP customers.

FX (or FX-like or VNXX) calls are not local calls, though they appear so to the end-user making the call. But neither are they treated strictly as toll calls. The purpose of the FX arrangement is to handle a high volume of calls between two points (an end-user customer exchange serving area and the business' exchange service area) as if the calls were local (thus, transparent to the end-users). The Arbitrators do not agree with CenturyTel's argument that the service more closely resembles 800 exchange service because the calls are primarily, or totally, inward. It may also be argued that, historically, FX service has been constituted primarily of inward dialed calls. This observation will affect the Arbitrators' decisions on the two remaining points in this Arbitration Award.

The Arbitrators take into account the FCC's overall position with regard to ISP-bound traffic. The FCC states in its ISP Remand Order that it does not want to limit innovation and expansion of internet services despite its desire to assign the costs of internet services to the end users of those services. The FCC's interim bill-and-keep provision for local ISP-bound traffic affords the commission additional time to gather information for an informed decision regarding the final disposition of compensation. The FCC also states that it wants to examine ISP traffic issues on a case by case basis. The Arbitrators conclude that the FCC may conceive of a broadened definition in the future for the term "Local Traffic" or a specific methodology related to ISP-bound traffic rates, terms or conditions.

The Arbitrators conclude that at this time the ISP-bound traffic proposed by Level 3 is not local traffic because Level 3's ISP customers have no presence in the local service exchange area and therefore the calls made to those customers do not meet the recognized standard definition of local traffic.

The impact of Level 3's proposed service plan upon numbering resources, although it was not specifically or separately addressed in the issues included in this arbitration, is related to the issue of whether or not Level 3's service offering is "local" because number blocks are obtained by LECs for the provision of local service. The Arbitrators conclude that CenturyTel's